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IN THE

Supreme Court of the United States

October Term, 1963

No. 531

JACK B. COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

MARION E. SIBLEY and
VINCENT C. GIBLIN
605 Lincoln Road
Miami Beach, Florida

SAM DANIELS
1414 duPont Building
Miami 32, Florida
Attorneys for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1963

No. ——

JACK B. COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals For The Fifth Circuit. This judgment affirms petitioner's conviction, under Section 145(b) of the Internal Revenue Code of 1939, on two counts for willfully attempting to evade or defeat income taxes for the fiscal years ending in 1953 and 1954.

OPINION BELOW

The opinion of the United States Court of Appeals For The Fifth Circuit is not yet reported, but is set out in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The judgment below was entered on August 8, 1963 (R. 524), and is attached as Appendix B. A petition for rehearing was filed on August 28, 1963, and denied on September 12, 1963 (R. 525-531). The order denying the petition for rehearing is attached as Appendix C.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

"Rule 29. Motion for Acquittal

(a) **Motion for Judgment of Acquittal.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) **Reservation of Decision on Motion.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the

jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

QUESTIONS PRESENTED

Question One

Did the Fifth Circuit Court of Appeals have the right to review the sufficiency of the evidence in this non-jury federal criminal prosecution and find that harmless error was committed when, at the close of the government's case-in-chief, the trial judge erroneously reserved ruling on petitioner's motion for judgment of acquittal and required petitioner to proceed without a ruling on his motion?

Question Two

Does a trial judge in a non-jury federal criminal prosecution have the right to exercise his fact-finding power in ruling on a motion for acquittal when the government rests its case-in-chief; or, must he apply the same standard used in jury trials and consider the evidence in the light most favorable to the government?

Question Three

When the government rests its case-in-chief in a federal criminal prosecution and the defendant's motion for judgment of acquittal is not granted, does the defendant waive the right to challenge the sufficiency of the evidence to convict him at this stage of the proceeding by thereafter offering evidence in an effort to defend himself?

STATEMENT

In 1959, a two count indictment was returned against petitioner in the Southern District of Florida, Miami Division (R. 1-3). Petitioner was charged, under 26 U.S.C., Section 145 (b), with willfully attempting to evade income taxes for the fiscal years ending in 1953 and 1954 (R. 1-2). Petitioner pleaded not guilty (R. 3) and waived jury trial (R. 38-39).

The case was tried non-jury in 1961 (R. 38-39). The government's evidence centered around certain complex business transactions between petitioner and the Dominican Republic's General Rafael Trujillo, Jr. Since questions of federal criminal procedure are the crux of the present petition, an exhaustive review of this evidence is neither necessary nor appropriate. It suffices to say that, during the 1953-1954 tax years in question, petitioner received and retained some $500,000.00 more than it cost him to have certain fighter planes and spare parts delivered to the Dominican Republic. Petitioner only reported $61,000.00 of this money as net income to himself (R. 19, 28).

The government proceeded on the theory that the excess funds were profits for and taxable income to the petitioner. Petitioner, on the other hand, contended that he reported as income all of the funds which were his and that the excess belonged to the Trujillo group. Petitioner maintained that he was to and did, in fact, pay the excess funds over to the Trujillos when and as requested.

According to the Fifth Circuit's opinion below, the government's case-in-chief:

> " . . . showed either that appellant acted as a dealer and earned the sums in question as profit, or that he received the sums as a purchasing representative or agent, and in either event claimed and used the funds as his own. Of course, there was contradicted evidence that the funds or at least undisclosed portions were due others under an arrangement whereby appellant could make use of them in his unlimited discretion in the nature of borrowing . . . " (R. 521).

When the government rested its case-in-chief, petitioner moved for a judgment of acquittal. The trial court, over petitioner's objection, took the motion under advisement and required petitioner to proceed without a ruling on his motion. In this regard, the record is as follows:

"Mr. Pearson:

It was served in New York on Mr. Garcia.

The Government would like at this time, Your Honor, to rest its case.

The Court:

All right.

Mr. Rosen:

May it please the Court, the defendant, Jack B. Cooper, by and through his attorney respectfully moves this Honorable Court to enter a dismissal and or a judgment of acquittal on the grounds that the Government has failed to establish beyond and to the exclusion of a reasonable doubt and even a prima facie case of the counts alleged in the indictment, that is both counts of the indictment.

If the Court would spare the time, I should like to present argument on that basis and point out to the Court the supporting law.

The Court:

I will take it under advisement. You can preserve your argument until later on.

Mr. Rosen:

It puts me in an awkward position, Your Honor.

The Court:

> I am going to take it under advisement. Proceed with the case. I certainly have not made a determination of that question in my own mind as yet, Mr. Rosen. So you may proceed. Call your next witness, and we will reserve time for argument at some appropriate moment." (R. 353-354).

To appreciate the situation at this point, it should be recalled that this was a non-jury trial with the fact-finding power lodged in the trial court. Faced with a judge and fact-finder who would not rule on the sufficiency of the evidence to sustain a conviction, petitioner went forward and offered evidence on his own behalf (R. 355-418). After petitioner rested, the government introduced rebuttal evidence (R. 418-427). When both sides rested, petitioner again moved for a judgment of acquittal and the trial court again took the motion under advisement (R. 427).

After keeping the matter under advisement for over six months, the trial court ultimately found petitioner guilty (R. 429), filing detailed findings of fact and conclusions of law (R. 430-442). These findings and conclusions are based on all of the evidence introduced by both sides (E.g., Par. 18 of the findings which accepts the government's rebuttal evidence as true. R. 433).

The trial court has yet to rule on petitioner's motion for acquittal made when the government rested its case-in-chief. The trial court's findings and conclusions make no mention of and express no opinion as to the sufficiency of the government's case-in-chief to sustain a conviction.

After his post trial motions were denied (R. 495-497), petitioner appealed to the Fifth Court of Appeals. The Fifth Circuit affirmed his conviction, holding that the trial judge committed harmless error in reserving ruling on petitioner's first motion for a judgment of acquittal. The affirming opinion is attached hereto as Appendix A and reasons as follows on this point:

> 1. The normal rule is that a criminal defendant, by offering evidence after his motion for acquittal is denied, waives his right to thereafter question the sufficiency of the government's case-in-chief. However, the normal waiver rule does not apply in the present case because Rule 29(a) of the Federal Rules of Criminal Procedure does not permit a trial judge to reserve ruling on the motion when the government rests its case-in-chief.
>
> 2. In a non-jury federal criminal prosecution, the trial judge should exercise none of his fact-finding power in ruling on a motion for acquittal when the government rests its case-in-chief. In both jury and non-jury cases, the motion should be disposed of by viewing the evidence in the light most favorable to the government. This being true, a court of appeals has the power to so view the evidence on appeal and conclude that the motion for acquittal should have been denied.
>
> 3. Viewed in such light, the government's case-in-chief was sufficient to sustain a conviction in the present case. Accordingly, it was

harmless error to reserve ruling on the motion for acquittal.

It is to this opinion that the present petition is directed.

REASONS FOR GRANTING THE WRIT

Petitioner urges the Court to grant this petition for a writ of certiorari to the United States Court of Appeals For The Fifth Circuit for the following reasons:

1. The petition should be granted to consider questions of importance in the administration of justice in the federal courts. These questions arise in the context of the Federal Rules of Criminal Procedure and involve the fundamental rights of those accused of crime by the federal government.

2. The decision below is in probable conflict with this Court's decisions in *United States v. Mersky*, 361 U.S. 431; and *Fong Foo v. United States*, 369 U.S. 141. Had the trial judge granted petitioner's motion for acquittal in the present case, both the Fifth Amendment's Double Jeopardy Clause and 18 U.S.C., Section 3731 would have precluded the government from obtaining appellate review. The Fifth Circuit cannot be correct in concluding it had the right to review the sufficiency of the evidence and find harmless error in the trial court's refusal to rule on petitioner's motion for acquittal. The federal district judge, who hears the evidence, must rule on a motion for acquittal when the government rests its case-in-chief. Whenever he grants the motion, his decision is neither directly nor indirectly subject to review. It is not harmless error to deprive a criminal defendant

of the benefit of the trial judge's ruling on a motion, which could conclusively determine the defendant's innocence.

3. Assuming that the Fifth Circuit had the power to pass on the sufficiency of the government's case-in-chief, a further question arises since the case was tried non-jury. The Fifth Circuit expressly states that the evidence was conflicting and that it viewed the evidence in the light most favorable to the government in concluding that the trial judge should have denied petitioner's motion for acquittal. A serious and important question arises as to the standard to be applied by a district judge in ruling on such a motion in a non-jury trial. If, as in civil cases, the trial judge can pass on questions of credibility at this stage of the proceeding, the Fifth Circuit erred in viewing the evidence in the light most favorable to the government.

A direct of conflict exists on this point. To illustrate, in *United States v. Camp*, (D.Hawaii, 1956), 140 F.Supp. 98, 99, the court held:

> ". . . This case, however, is a criminal case tried to the court without a jury, jury trial having been waived by both parties. The motion for judgment of acquittal, therefore, logically goes beyond the test of whether the evidence is sufficient to *sustain* a conviction by the trier of fact. Where the court is the trier of fact, the test to be applied to the evidence produced by the government is not whether it *could* sustain a conviction, but whether the government has so far substantiated its case, that absent a defense

the court *would* find the defendant guilty as to any of the counts of the indictment.

A contrary rule, one adopting the intimation of the government, would put upon the defendant the risk that by his own evidence, as by testimony produced on cross-examination, he might supply the evidence which convinces the trier of fact of his guilt, where absent such evidence the trier of fact would not be so convinced. To subject the defendant in a criminal case to such a risk would be contrary to the principles by which the criminal law has developed in this country. It would in effect require the defendant to assist in producing a vital element of the evidence which convicts him.

The question before this court upon this motion, therefore, is not whether the evidence is substantial enough to warrant submission of the case to a jury, but whether the government has met its full burden of proof, that of showing beyond a reasonable doubt the guilt of the accused." (Emphasis the court's).

The exact contrary is held in *United States v. Cascade Linen Supply Corporation*, (S.D.N.Y., 1958), 160 F.Supp. 565, 568, where the court said:

". . . Accordingly, in passing on these motions I decline to follow the holding in the Camp case, supra. I will determine these motions as judge of the law in this case and not as the trier of the facts. . . ."

Uncertainty on crucial issues has no place in a federal criminal prosecution. What standard should be applied in testing the sufficiency of the government's case-in-chief in a non-jury criminal trial is an important issue worthy of this Court's consideration.

4. One phase of the court's opinion below involves the extent, if any, to which a criminal defendant, by offering evidence in his own behalf, waives the right to thereafter question the sufficiency of the government's case-in-chief. This Court has no square holding on the issue. As stated in *Cephus v. United States**:

> "The few decisions which elaborate on the waiver rule attempt to justify it on the ground that the defendant's loophole-plugging evidence renders harmless any error in the denial of the original motion, or that a defendant who voluntarily introduces evidence is estopped from denial of its efficacy. These arguments do not meet the objection that the defendant's willingness to ask for acquittal on the Government's evidence is not a willingness to gamble on a prediction that the jury or appellate court will find that evidence insufficient. Moreover, there is danger that under the waiver rule prosecutions may be pursued with inadequate evidence in the hope that defendants will supply missing evidence. The rule seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense.

*This decision of the Court of Appeals For the District of Columbia was rendered on September 12, 1963, and is not yet reported. It is attached hereto as Appendix D.

A New Jersey court in 1916 rejected the waiver rule in criminal cases on the ground that:

> the application of the civil rule to criminal trials is open to the criticism that, by force of a ruling that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself. . . .

Nevertheless, most jurisdictions, including Federal circuits, have consistently followed the waiver rule, and the Supreme Court in a case, from the Ninth Circuit, has provided at least a dictum supporting it. But as the quotation suggests, the rule was imported from civil into criminal trials without considering the demands of our accusatorial system of criminal justice." (Appendix D, p. 17).

The defects in the waiver rule are pinpointed in a recent law review article, *The Motion For Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151 (1961). Recognition of the waiver rule by the Fifth Circuit below and its rejection in *Cephus*, by the District of Columbia Circuit, creates a difference of opinion which merits consideration by this Court. No matter how this issue is decided, one accused of crime should, at least, be certain of the consequences if he offers evidence in the attempt to prove his innocence.

5. The federal decision below is clearly wrong and unjustly convicts your petitioner in this federal criminal prosecution.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARION E. SIBLEY
605 Lincoln Road
Miami Beach, Florida

VINCENT C. GIBLIN
605 Lincoln Road
Miami Beach, Florida

SAM DANIELS
1414 duPont Building
Miami 32, Florida
Attorneys for Petitioner

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 19691

JACK B. COOPER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(August 8, 1963.)

Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges.

BELL, Circuit Judge: Appellant was convicted in 1962 after a non-jury trial in 1961 on a two count indictment charging him with unlawfully attempting to evade the payment of income taxes by the filing of false returns for fiscal years ending in 1953 and 1954.[1] The indictment was returned in 1959.

---

[1] § 145 (b) of the Internal Revenue Code of 1939.

The case comes here after protracted post trial proceedings seeking in the alternative a judgment of acquittal, or a new trial, or the vacation of the findiings of fact, conclusions of law, and the adjudication of guilt to allow the introduction of surrebuttal evidence.

The additional proof was to be offered for the purpose of bolstering a contention that the funds on which appellant failed to pay taxes were embezzled, and thus to afford escape under the umbrella of *Commissioner* v. *Wilcox*, 1946, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 752. The theory was that the funds were acquired before *Wilcox* was overruled in *James v. United States*, 1961, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d. 246, and that *James* reserved a form of residual protection to those embezzling in the interim. The application of the teaching of *Wilcox* in the first instance to the facts of this case makes one of the issues on this appeal. We do not reach the validity of the residual protection theory of *James*. Another issue centers on the failure of the trial court to rule on the motion to dismiss or for entry of judgment of acquittal when the government rested its case. Under our view this involves the question of sufficiency of the evidence at that point in the case. Insufficiency of the whole of the evidence makes the other issue in the case.

The case in chief for the government showed that in 1952 the Dominican Republic made $1,504,000 available to appellant through a Chase Manhattan Bank letter of credit with which to purchase planes for its air force. He owned no planes, but acted either as a purchasing representative, or as a dealer who purchased and resold them at a profit to the Dominican Republic. Whether one of the other is immaterial to the result reached by the Dis-

trict Court or here. The total was to include planes at $45,000 each together with $2,000 each for freight.

Appellant contacted a Washington acquaintance in an effort to locate the planes. It was suggested that they could be obtained from the United States Government through the State and Defense Departments. Appellant advised them that he wished to purchase them from other sources because he had more leeway for a profit in following that course.

This acquaintance located thirty-two planes in Sweden and they were purchased at a price of $30,500 each or a total of $976,000 with payments being made out of the letter of credit. An additional $64,000 was remitted to the Dominican Republic to cover freight charges. The balance of $464,000 was transmitted to the Miami Beach First National Bank in the tax year 1953, and deposited in a special account in the name of and under the control of appellant. The sales invoices were from the Swedish seller to appellant at the lower price, and were delivered to him. He, in turn, invoiced them on his billhead to the Dominican air force at $45,000 each. The new invoices were substituted with the bank for the old invoices. The partial assignments and substitution was under the terms of the letter of credit, and the new invoices were forwarded to the Dominican Republic by the bank. Appellant reported only $46,000 of the $464,000 balance received by him as income on the tax return for the fiscal year ended in 1953. He listed it simply as income received as "purchasing agent".

Two additional transactions, falling in fiscal year 1954, and following the same pattern, involved the pur-

chase of ten additional planes and spare parts for the Dominican Republic air force whereunder a total of $1,182,142.30 was entrusted to appellant through letters of credit with similar results. This time the excess over prices paid totalled $281,045.37. This was deposited in the account of Dominican Import & Export Company, an inactive corporation, at Miami Beach First National Bank. Appellant exercised exclusive control over this bank account. His tax return for the fiscal year ending in 1954 showed only income of $15,000 from this corporation.

The sums deposited in these bank accounts were claimed and used by appellant as his own. He used the funds to pay for, among other things, a personal residence, automobiles, furniture, and even disbursed some of it in the form of loans to friends and relatives.

He gave sworn financial statements to a surety company in connection with another matter as of January 12, 1953 in which he claimed the funds then in the special account as his own with no liabilities outstanding. In the meantime, the next transaction had occurred with the resultant deposit in the corporate account under his control. He gave another financial statement and claimed those funds as his own with no liabilities outstanding.

The net income of appellant for each of the years involved was established on the net worth plus non-deductible expenditure accounting method, and there was abundant proof that the most likely source of the additional income established was the receipt directly; and indirectly through the corporation, of the unexpended amounts of these letters of credit. There was evidence that members of a group headed by General Rafael Trujillo, Jr.,

in the Dominican Republic owned part or all of these sums, but there was no writing to prove it and no member of the group testified.

Appellant represented to his Washington acquaintance who located the planes, and who was to receive one half of all profit, that his profit on the first transaction was $64,000, and paid him $32,000 under their arrangement. On the other hand there was evidence that his profit was $69,000 of which $23,000 went to his brother for services rendered leaving the amount of $46,000 which he returned for taxes. There was other evidence that appellant was to draw $25,000 per year salary from the corporation plus $2,000 per plane purchased.

This was the state of the evidence when the government rested. The case was tried on the apparent defense that the unexpended sums belonged to the so-called "Dominican group", with appellant having full authority to make personal use of the funds on a loan basis, and that they were so used. On the post trial motions the defense was amplified to assert the embezzelment basis; i.e., that appellant and the Dominican group embezzled the funds from the Dominican Republic under a graft or kick-back arrangement, and as such they were non-taxable under the *Wilcox* case holding.

The District Court made comprehensive findings of fact, all of which are supported by the evidence. In sum, the facts showed personal use of the funds, and a claim to the funds as reflected in the financial statements with the representation of no liabilities. There was no writing of any kind substantiating any sums due others out of the funds, although there was evidence of some pay-

ments. There was no mention on either of the tax returns in question of the funds other than the receipt of the $46,000 as "purchasing agent". Appellant kept no books on the transactions. The court, in the guilty finding, concluded that the receipt by appellant of sums greatly in excess of those declared on his income tax returns in the years in question were evidenced by the net worth calculations as well as by the tracing of the aircraft and aircraft parts sales transactions, and held that his true net income for 1953 was $263,600.52 and $207,381.45 for 1954.

Appellant moved for judgment of acquittal when the government rested its case on the ground that the evidence was insufficient to sustain a conviction. The court took the motion under advisement and ordered appellant to proceed. This is laid as error on the authority of *Jackson v. United States*, 5 Cir., 1958, 250 F.2d 897, a case involving a jury trial, where we pointed out that there was no provision for a court to reserve ruling on a motion for acquittal made at the close of the government's case, as distinguished from such a motion made at the close of all of the evidence, and held that the reservation of a ruling would force a defendant to election between resting and being deprived of the benefit of the motion. This followed from the principle that the introduction of evidence after the denial of the motion made at the close of the prosecution's case waives any error in the denial of the motion. *See T'Kach v. United States*, 5 Cir., 1957, 242 F.2d 937; and *Harris v. United States*, 5 Cir., 1961, 285 F.2d 85.

We affirm the principle enunciated in *Jackson*, but we must go further and determine whether the failure

to rule constituted harmful error. There can be no error if the evidence was sufficient to sustain a conviction when the government rested. 28 USCA, § 2111. And for the purposes of our holding we assume, without deciding, that the objection to the failure to rule was adequate, and that there was no waiver otherwise. Cf. *United States v. Goldstein*, 2 Cir. 1948, 168 F.2d 666.

A careful review of the evidence up to the point of the motion makes it manifest that it was ample to sustain the conviction. It showed either that appellant acted as a dealer and earned the sums in question as profit, or that he received the sums as a purchasing representative or agent, and in either event claimed and used the funds as his own. Of course, there was contradicted evidence that the funds or at least undisclosed portions were due others under an arrangement whereby appellant could make use of them in his unlimited discretion in the nature of borrowing. Taking the view most favorable to the judgment of conviction, as is the law, *Glasser v. United States*, 1942, 315 U.S. 60, 61 S.Ct. 457, 86 L.Ed. 680; *Strauss v. United States*, 1963, 311 F.2d 926; *Teate v. United States*, 5 Cir., 1961, 297 F.2d 120; and *Grissette v. United States*, 5 Cir., 1963, 313 F.2d 187, we conclude that the government's case was sufficient and that the error in reserving ruling on the motion of appellant was therefore harmless. This, in affect, gives appellant the full benefit of the motion.

Taking also the view of the evidence most favorable to the government, it is clear that the evidence adduced on the full trial was sufficient to warrant the conviction. In sum, there was direct and undisputed proof of the increase in net worth, the receipt of and claim to the

funds from the air craft and air craft parts transactions, a disavowal of any liabilities against these funds, their expenditure for the personal use of appellant, a failure to disclose the receipt in any manner for income tax purposes other than the $46,000 item and $15,000 in income from the corporation. There was also a failure to keep records. This made out a case of willfully and knowingly attempting to evade and defeat income taxes due by filing false and fraudulent tax returns. See *Spies v. United States*, 1942, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 on proof of intent.

The District Court did not err in rejecting the defense that no taxes were due because of the embezzled funds doctrine of *Wilcox*. There a bookkeeper embezzled money from his employer and it was held to be non-taxable. But prior to the transactions in question the Supreme Court decided *Rutkin v. United States*, 1952, 343 U.S. 130, 72 S.Ct. 571, 96 L.Ed. 833, limited *Wilcox* to its facts, and held funds received by way of extortion subject to income taxes. The funds here are not analogous to extorted or embezzled funds in the sense of lack of title. The argument is that they were produced under a graft or kickback arrangement between appellant and persons in the government of the Dominican Republic. This theory is asserted notwithstanding a total lack of evidence on the trial, or by way of proffer on the motion to vacate and reopen the case, as to the specifics of the graft arrangement, or as to any agreement between and among the grafters regarding their division and ownership of the funds produced. It is also noteworthy that appellant, undisputedly, was legitimately engaged as a purchasing agent for, or as a dealer in airplanes and

some portion, undisclosed, of the funds produced were his legitimate earnings or profit.

We hold that these funds were gains and profits as those terms are used in § 22(a) of the Internal Revenue Code of 1939. They were not of the *Wilcox* type,[2] and when received, the doctrine of that case had been limited to embezzled funds. This was enough for the rejection of this defense by the trial court, and for denying the motion to vacate. Indeed, there was no evidence on the trial that appellant or his accountant even knew of *Wilcox* or *James*. There was no reliance then on the *Wilcox* doctrine. It came as an after-thought following conviction but neither the evidence adduced or proffered will support it.

Having adopted the view that *Wilcox* is not applicable, we do not reach the question of whether there is any protection under the statement in *James* that willfulness cannot be proven in a criminal prosecution for failure to include embezzled funds in gross income where the receipt of the funds occurred while *Wilcox* was still effective, or in the words of the Chief Justice: "so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed."

Sufficient evidence appearing in a record free from harmful error to warrant the conviction of appellant, the judgment appealed from should be and is AFFIRMED.

---

[2] Cf. *Chadick v. United States*, 5 Cir., 1935, 77 F.2d 961, where graft in the form of bribes to a public official for contracts was held to be taxable income.

APPENDIX B

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1962

No. 19691

D. C. Docket No. 11,276-M-Cr.

JACK B. COOPER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Jack B. Cooper, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 8, 1963

Issued as Mandate:

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 19,691

JACK B. COOPER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 17712

EARL R. CEPHUS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

---

Decided September 12, 1963

Mr. Walter E. Gillerist (appointed by this Court) with whom *Mr. Edward L. Carey* was on the brief, for appellant.

Mr. William C. Pryor, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Frank Q. Nebeker* and *Paul A. Renne*, Assistant United States Attorneys, were on the brief, for appellee.

Before BAZELON, *Chief Judge*, WASHINGTON and WRIGHT, *Circuit Judges*.

BAZELON, *Chief Judge:* Appellant and a co-defendant were indicted for unauthorized use of a motor vehicle

(D. C. Code § 22-2204). In a joint trial the court denied appellant's motion for acquittal at the close of the Government's case.[1] Thereafter the co-defendant, testifying on his behalf, related facts tending to prove his own innocence and appellant's guilt. Appellant then called two witnesses—his wife, who provided an alibi, and his mother, who sought to impeach the co-defendant. The jury found both defendants guilty, and appellant was sentenced to imprisonment for sixteen months to four years. His application for leave to appeal *in forma pauperis* was "denied as frivolous" by the District Court. Appellant's subsequent application to this court was granted over the opposition of the United States Attorney. See *Coppedge* v. *United States*, 369 U.S. 438 (1962).[2]

In this appeal appellant contends that the Government's case-in-chief was insufficient to sustain a verdict of guilty and that therefore the trial court erred in denying his motion for judgment of acquittal. We agree. The Government's witnesses testified that a car was reported missing from a dealer's service garage on June 13, 1962, that the co-defendant was arrested while driving the vehicle that night, that one of several fingerprints found on the outside of the left ventilation window was appellant's, that appellant after his arrest denied any knowledge of

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[1] We think that denial was implicit in this statement by the court: "I am going to submit it to the jury. In the meanwhile, I will go into it more thoroughly, the motion to set aside the verdict as to Cephus if they find him guilty. I don't want Cephus to be misled by what I am saying here. I am not saying I will grant it. I will hear it, and hear arguments on it. You may convince me that you are right. I am teetering on it. I am not satisfied. So I will submit it to the jury and we will see what happens."

[2] We note that after appellant had been in custody 11½ months before trial and 11 months after trial—a total of over 22 months—he was released pending appeal on his own recognizance.

the automobile, and that he claimed not to have seen co-defendant since before the date of the alleged unauthorized use. Based upon that evidence alone, the jury could not have found beyond a reasonable doubt that appellant was guilty.[3]

The Government, however, contends that we are required to consider all the evidence, and not the Government's alone, in determining whether a judgment of acquittal is now required. It says that a defendant is ordinarily deemed to have waived his motion for acquittal at the close of the Government's evidence when, after denial of the motion, he chooses to introduce evidence on his own behalf.[4] We think, however, that it would be an unwarranted extension of this waiver doctrine to apply it in the circumstances of this case.

One of the greatest safeguards for the individual under our system of criminal justice is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense.

> Ours is the accusatorial as opposed to the inquisitorial system. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the

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[3] See *Curley v. United States*, 81 U.S.App.D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837, *rehearing denied*, 331 U.S. 869, 870 (1947).

[4] *Hall v. United States*, 83 U.S.App.D.C. 166, 168 F.2d 161, *cert. denied*, 334 U.S. 853, *rehearing denied*, 335 U.S. 839, 840 (1948); *Ladrey v. United States*, 81 U.S.App.D.C. 127, 155 F.2d 417, *cert. denied*, 329 U.S. 723 (1946).

> accused ever under judicial safeguards, but by evidence independently secured through skillful investigation. [*Watts v. Indiana*, 338 U.S. 49, 54 (1949) (Frankfurter, J.)][5]

Accordingly Rule 29(a) of the Federal Rules of Criminal Procedure provides that a motion for judgment of acquittal must be granted "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction." Denial of such a motion at the close of the Government's evidence is not immediately reviewable.[6] Nevertheless, if the defendant then rests or if he introduces evidence which adds nothing to the Government's evidence, the sufficiency of the Government's case-in-chief may be reviewed on the appeal from a conviction.[7]

Difficulty arises where the defendant himself introduces evidence which has the incidental effect of filling the gap in the Government's case. If the appellate court must limit its review to the evidence at the close of the Government's case, it will be required to direct an acquittal even though there is sufficient competent evidence at the close of the entire case to sustain a conviction. The waiver doctrine prevents acquittals in such cases.

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[5] See also *Report of the Attorney General's Committee on Poverty and the Administration of Justice* 10 (1963).

[6] The denial is neither a final decision appealable under 28 U.S.C. § 1291 (1958), nor, of course, an interlocutory decision appealable under 28 U.S.C. § 1292 (1958).

[7] We read the Government's concession and the Supreme Court's decision in *Hemphill v. United States*, 312 U.S. 657 (1941) (per curiam), and Rule 52(b), F.R. Crim.P., as repudiating the notion that renewal of the motion at the end of the case is necessary to gain appellate review of the sufficiency of the evidence. Our references to "waiver" in this opinion exclude this notion.

The few decisions which elaborate on the waiver rule attempt to justify it on the ground that the defendant's loophole-plugging evidence renders harmless any error in the denial of the original motion,[8] or that a defendant who voluntarily introduces evidence is estopped from denial of its efficacy.[9] These arguments do not meet the objection that the defendant's willingness to ask for acquittal on the Government's evidence is not a willingness to gamble on a prediction that the jury or appellate court will find that evidence insufficient.[10] Moreover, there is danger that under the waiver rule prosecutions may be pursued with inadequate evidence in the hope that defendants will supply missing evidence. The rule seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense.[11]

A New Jersey court in 1916 rejected the waiver rule in criminal cases on the ground that:

> the application of the civil rule to criminal trials is open to the criticism that, by force of a ruling that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself . . .[12]

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[8]See *United States* v. *Goldstein*, 168 F.2d 666, 669-70 (2d Cir. 1948).

[9]See *Lyer* v. *United States*, 183 Fed. 102,104 (2d Cir. 1910).

[10]See *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151, 1153 & n.17 (1961).

[11]See generally *The Motion for Acquittal: A Neglected Safeguard*, *supra* note 10.

[12]*State* v. *Bachelier*, 89 N.J.L. 433, 436, 98 Atl. 829, 830 (N.J. Sup.Ct. 1916).

Nevertheless, most jurisdictions, including Federal circuits, have consistently followed the waiver rule;[13] and the Supreme Court, in a case from the Ninth Circuit, has provided at least a dictum supporting it.[14] But as the quotation suggests, the rule was imported from civil into criminal trials[15] without considering the demands of our accusatorial system of criminal justice.

In Federal criminal cases, still another point must be considered. As Dean Wigmore pointed out:

> Where an opponent, at the close of proponent's case in chief, has made a motion asking in effect for the direction of a verdict, . . . the opponent cannot claim a ruling by the judge, as a matter of right . . . *without then resting his own case.* At that point, he is only invoking the Court's

[13] See *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151, 1152 & n.9 (1961) (citing cases; *Mosca v. United States*, 174 F.2d 448 (9th Cir. 1949); *Harris v. United States*, 285 F.2d 85 (5th Cir. 1960), *cert. denied*, 368 U.S. 820 (1961); *Gaunt v. United States*, 184 F.2d 284 (1st Cir. 1950), *cert. denied*, 340 U.S. 947, *rehearing denied*, 340 U.S. 939 (1951).

[14] *United States v. Calderon*, 348 U.S. 160, 164 n.1 (1954).

[15] See, e.g., *Leyer v. United States*, 183 Fed. 102, 104 (2d Cir. 1910): "We see no reason to repudiate this [civil] rule in criminal causes." *Burton v. United States*, 142 Fed. 57, 59-60 (8th Cir. 1906): "This rule is uniformly applied in civil cases [citing five civil cases]. And no reason is perceived why it is not equally applicable to criminal trials."

In this Circuit the criminal waiver cases trace to *Perovich v. United States*, 205 U.S. 86 (1907), where the Supreme Court merely said: "Without resting on the proposition that introducing testimony after such a motion has been overruled is a waiver of any exception to the action of the court [citing civil cases], we are of the opinion that neither at this time nor at the close of all the testimony would the court have been justified in withdrawing the case from the jury." *Id.* at 91.

> discretion; not until the entire evidence is closed may he demand a ruling *as of right* . . .

Thus, said Wigmore, if the opponent proceeds with his evidence, thereby confirming the discretionary nature of the original ruling, he loses any opportunity to protest the original error:

> This is sometimes put upon the ground of *waiver*; but it is rather a necessary consequence of the discretionary nature and limited scope of the first ruling. [9 Wigmore, Evidence § 2496 (3d ed., 1940)][16]

But Rule 29(a) of the Federal Rules of Criminal Procedure makes it clear that the first ruling is not discretionary in criminal cases. A judgment of acquittal is mandatory if the Government's case is insufficient. The trial judge has no discretion to reserve his ruling in the expectation that the defendant will testify.[17]

Nevertheless, we need not here question the entire waiver doctrine in criminal cases. We need only qustion its application based upon the defendant's response to damaging testimony of a co-defendant testifying on his own behalf. It is clear that if the defendant himself rests on the Government's evidence, the co-defendant's testi-

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[16]Wigmore's citations include several federal criminal cases, but all of them shortly come to rest on civil cases, on cases which assume the rule without discussion or citation, or on cases not relevant to waiver. 9 WIGMORE, EVIDENCE 313 n.1, 315 n.3 (3d ed. 1940).

[17]*Jackson* v. *United States*, 250 F.2d 897 (5th Cir. 1958). *But cf. United States* v. *Goldstein*, 168 F.2d 666, 669-70 (2d Cir. 1948).

mony does not waive the defendant's motion.[18] It is also clear that the defendant's own evidence, introduced in response to the co-defendant's testimony, does not waive the motion if it adds nothing to the Government's case. The waiver question arises only where, as here, the defendant himself, in seeking to explain, impeach, or rebut the co-defendant's testimony, introduces evidence which overshoots that mark and tends to cure a deficiency in the Government's case.[19] We think the waiver doctrine cannot fairly be applied in this situation.

A defendant's attempt to explain, impeach, or rebut a co-defendant's testimony does not at all imply that after the defendant made his motion to dismiss, he then re-evaluated the Government's case-in-chief and now thinks it sufficient. It may be both necessary and possible for the defendant to meet the co-defendant's testimony. He should be free to do so without risk that he may be held to have waived his motion.[20]

If the appellant is now deemed to have waived his right to test the sufficiency of the Government's case, the

[18] In *Middleton* v. *United States*, 106 U.S.App.D.C. 50, 269 F.2d 241 (1959), the Government apparently conceded this point, but argued that defendant's acquiescence in co-defendant's attempt to provide an alibi for all the defendants was a waiver; since he might have moved for a severance. Brief for Appellee, pp. 6-7. The per curiam opinion granting an acquittal despite the damaging effects of the attempted alibi impliedly rejected that theory.

[19] Defendant's counsel attempted to elicit from defendant's mother a report of a prior statement by co-defendant inconsistent with his testimony, but as reported by her the statement might have been sufficient to inculpate rather than exculpate defendant. A colloquy between the court and counsel as to her presence in the courtroom makes it clear that she would not have been called if co-defendant had not testified.

[20] See *Regina* v. *Abbott*, [1955] 2 All E.L.R. 899 (Ct.Crim. App.).

Government will in effect have been able to use the coercive power of the co-defendant's testimony as part of its case-in-chief, even though the Government was prohibited from calling the co-defendant to testify for the prosecution. Although this prohibition arises from the co-defendant's privilege against self-incrimination,[21] its effect excludes from the Government's case-in-chief the testimony of one who has an incentive to exculpate himself by inculpating his fellow defendant.[22]

Reversed and remanded with directions to vacate the judgment and enter a judgment of acquittal.

WRIGHT, *Circuit Judge, concurring:* I concur in the well considered opinion of the court.

Pursuant to Rule 29(a), F.R.Crim.P., appellant moved for judgment of acquittal at the close of the Government's case. Instead of granting the motion, the trial judge made no ruling. Under Rule 29, he was required to rule.[1] And in view of the insufficiency of the evidence then in the record, the motion should have been granted.

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[21] See 8 WIGMORE, EVIDENCE 406-08 (McNaughton rev. 1961).

[22] The Government may, in such cases, indict defendants separately or move for severance upon trial. *See United States* v. *Dioguardi*, 20 F.R.D. 10, 13 (S.D.N.Y. 1956), and cases cited. With only one of the accused on trial, the prosecution could call the other as its witness. Cf. *United States* v. *Augustine*, 189 F.2d 587, 588-89 (3d Cir. 1951); *United States* v. *Hiss*, 189 F.2d 822, 831-32 (2d Cir. 1950). And see *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959). The witness would retain his privilege against self-incrimination as to specific questions.

[1] The requirement is clear. The motion for judgment of acquittal may be made "after the evidence on *either* side is closed." Rule 29(a). (Emphasis supplied.) But it is only as to the motion "made at the close of *all the evidence*" that "the court may reserve decision." Rule

The fact that exculpatory evidence offered by his co-defendant implicated appellant in the crime cannot deprive appellant of his rights under Rule 29(a). Nor can appellant's efforts, in introducing evidence in his own behalf to offset his co-defendant's evidence, trigger the invocation of the waiver doctrine. Whatever continued validity that archaic doctrine may have, it certainly has no application to the facts of this case. Indeed, a simple reading of Rule 29(a) indicates that the waiver doctrine is without validity in any case.[2] A defendant cannot be boxed out of his Rule 29(a) rights by forcing him to go to trial with a co-defendant, or by waiting hopefully for him to convict himself.

29(b). (Emphasis supplied.) Thus, the court has no authority to reserve decision as to the motion made at the close of the Government's case. *Jackson* v. *United States*, 5 Cir. 250 F.2d 897 (1958). This facet of Rule 29 is in harmony with its basic command that when the Government has not made out its case, the defendant shall be acquitted without being required to put on his proof. And it is the inconsistency of the waiver doctrine with this command of the Rule that saps the authority it derives from long years of habitude.

[2] The grant of the motion in proper cases is mandatory, and not a matter of discretion, for the Rule states in terms that the court "*shall* order the entry of judgment of acquittal * * * if the evidence is insufficient to sustain a conviction." Rule 29(a). (Emphasis supplied.) See *Cooper* v. *United States*, 94 U.S.App.D.C. 343, 218 F.2d 39 (1954). The introduction of evidence after the denial of the motion does not "waive" the motion so as to prevent appellate review of the sufficiency of the evidence. *Hemphill* v. *United States*, 312 U.S. 657 (1941) (*per curiam*). If the denial of the motion was erroneous when made, it should be corrected on appeal. Few errors of law are as prejudicial to the defendant. Subsequent testimony cannot "cure" the error. See generally Comment, *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151 (1961).